No. 12,889

IN THE

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD. (a corporation),

Appellant,

vs.

VIKING AUTOMATIC SPRINKLER COMPANY (a corporation),

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

The statement of the case set forth in appellant's opening brief adequately covers the facts and respondent only wishes to emphasize the stipulation to the effect that both of the accidents involved were caused by the sole negligence of the Austin Company and there was no negligence on the part of the Viking Company, its officers, agents or employees which proximately contributed in any degree to the injuries sustained by Estrada and Taylor.

ARGUMENT.

I.

APPELLANT ASSERTS THAT THE CONTRACT CONTAINED ENFORCEABLE INDEMNITY PROVISIONS INDEMNIFYING AGAINST THE NEGLIGENCE OF THE AUSTIN COMPANY.

Respondent does not quarrel with appellant's statement that the contract to indemnify an indemnitee against its own negligence is not against public policy, and is enforceable in a Court of law. Appellant cites two cases as authority for this rule, the first being *Southern Pacific Co. v. Fellows,* 22 C.A. (2d) 87, 71 P. (2d) 75, the second being *Pacific Indemnity Co. v. California, etc. Limited,* 29 C.A. (2d) 260, 84 P. (2d) 313. In those two cases, in which the language of the Hold-Harmless agreement appears to be equally broad, the Courts reached opposite conclusions, but did enunciate the rule of law as hereinabove stated.

However, the vast majority of cases throughout the United States hold that only where the contract expressly provides for an agreement by a building contractor or subcontractor to indemnify or hold harmless an owner or principal contractor for injuries resulting from his own negligence will the indemnitor be held to his contract, and only then; 175 A.L.R. 144. In this annotation, it is pointed out that there are some decisions, although few in number, where the Courts have held that clauses have been sufficiently broad to indemnify the indemnitee against its own negligence without specifically providing for the same, but they are few in number. As a rule, a contract is construed as not covering damages resulting from in-

demnitee's negligence. *North American Railroad Construction Co. v. Cincinnati Traction Co.* (1909, C.C.A. 7th), 172 Fed. 214; *Washington & B. Bridge Co. v. Pennsylvania Steel Co.* (1914; C.C.A. 4th), 215 Fed. 32; *United States v. Wallace* (1927, C.C.A. 9th), 18 Fed. (2d) 20; *Pacific Indemnity Co. v. California Electric Works* (1938), 29 C.A. (2d) 260, 84 P. (2d) 313. In the above cases, one of the reasons given for strict construction of such clauses has been that such an agreement would impose upon the indemnitor an uncertain and indefinite liability which would be entirely in the hands of the indemnitee and would not only wipe out all of the profits from the contract, but might even exceed the total consideration. In *United States v. Wallace* (1927, C.C.A. 9th) 18 Fed. (2d) 20, the Court said:

> "As is pointed out in Parry v. Payne (Pa.), supra, we should not, in the absence of language free from all doubt, conclude that the parties intended the contractor should assume an obligation which, for a single act of negligence on the part of the owner, or one of his employees, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job."

Thus it is apparent that the language of the contract quoted at page 5 of appellant's brief, upon which reliance is based for recovery in this action, is insufficient to fix liability upon the defendant Viking Company for injuries and damages resulting solely from the negligence of the Austin Company, and so the trial Court found in its findings of fact (R. 19):

> "XIII. That the provisions of the contract itself are not susceptible to an interpretation that the defendant agreed to indemnify the Austin Co. for injuries received in accidents resulting from the sole negligence of the Austin Co., its agents, servants and/or employees."

It is the contention of the respondent that the language of the contract was not susceptible to such an interpretation and that any evidence which the appellant offered or attempted to introduce was insufficient to change the language of the contract so that it could possibly be interpreted to indemnify the Austin Co. for its own negligence.

II.

APPELLANT ASSERTS THAT THE CONTRACT WAS AMBIGUOUS AND REQUIRED THE RECEIVING OF EVIDENCE TO CLARIFY AND DETERMINE THE INTEREST OF THE PARTIES.

Respondent does not agree with appellant that the contract was ambiguous. It is the position and contention of respondent that the terms of the contract could not possibly be interpreted to indemnify the Austin Company for its own negligence and that such an interpretation could never be justified or upheld no matter what evidence was introduced by appellant.

From the inception of the case up until the appellant was about to close its case it took the position that no interpretation was needed and intended to base its entire case upon the contract, without any

evidence to indicate the intent of the parties or to aid the Court in interpretation. In the discussions between Court and counsel the following statements appear (R. 48):

> "Mr. Healy. I am willing, your Honor, to suggest this: that the matters be submitted to your Honor on the two opening statements made and further agree that the heart of the case is in the construction of that clause, and leave it to your Honor as a trier of facts and a trier of law if there is a mixed question, should there be, to decide it, and submit it to your Honor."

And again (R. 50):

> "Mr. Boyd. Well, it seems to me, that the—I don't think that the contract itself can be held to be ambiguous, so that it is a question of the intent. I don't know what the plaintiff is trying to say the various conversations were and what went on and so forth.
>
> Mr. Healy. I am not going to say anything.
>
> The Court. Apparently, as indicated by his opening statement, he is not relying on anything except the provision of the contract.
>
> Mr. Boyd. The provision of the contract, without any proof, without any evidence to explain the ambiguity or anything else?
>
> Mr. Healy. Right."

Therefore, at this late phase of the trial, appellant changed its entire theory and attempted to introduce some evidence through Samuel A. Johnson that was not admissible under any theory of law. No reason or excuse is given for the failure of appellant to be

prepared to offer admissible and documentary evidence. Appellant merely states that (Appellant's Brief 3, 4):

> "After the main contract and certain other exhibits were received in evidence and the stipulation of facts made, Appellant, realizing that the indemnitee provision of the contract was ambiguous, attempted to clear up the latent ambiguity in order to show the true intent of the parties by calling witness Samuel A. Johnson to develop certain facts."

Appellant then goes on to quote the order of Judge Erskine (Appellant's Brief 8) which reads in part as follows:

> "* * * there appears to be a latent ambiguity in the contract provisions at issue here requiring the taking of testimony to explain what the parties meant by such provisions * * *"

The order of Judge Erskine was dated July 24, 1950. Therefore, appellant, who successfully defended respondent's motion to dismiss the case before Judge Erskine on July 24, 1950, on the ground that the language of the contract presented a latent ambiguity that would require the taking of testimony, states in the present appeal that on January 15, 1951, only after the main contract and certain other exhibits were received in evidence and the stipulation of facts had been made, did it realize that there was a latent ambiguity. At that point, appellant attempted to call Samuel A. Johnson in order to clear up the latent ambiguity.

III.

APPELLANT ASSERTS THAT APPELLEE HAD INSURED AGAINST THE VERY LIABILITY SOUGHT TO BE ESTABLISHED AND THAT SUCH FACT WAS MATERIAL.

Such a fact may or may not be admissible, depending on the circumstances of each individual case. However, there is no evidence in the record nor any offer of admissible evidence or proof that the Viking Company carried a policy of insurance to which was attached an endorsement insuring them for liability incurred by contract. Article XII (R. 62) contains no provision requiring the Viking Company to carry such insurance although it sets out in detail what insurance was to be carried. Any attempt to introduce evidence that Viking Company had such insurance coverage through Samuel A. Johnson was improper and such evidence would be inadmissible for two reasons:

1. **That no proper foundation was laid to show that this witness had any knowledge of the insurance carried by the Viking Co.**

Mr. Johnson was called to the stand by Mr. Healy and the following occurred (R. 77):

"By Mr. Healy. Q. Are you connected with the defendant Viking Company?

A. Yes, sir.

Q. In what capacity?

A. I am an employee, an engineer.

Q. Are you an officer?

A. No, sir.

Q. Are you a manager?

A. Only insofar as I handle things when the manager isn't here.

Q. I will just ask you this: Are you familiar with this (40) contract that is here in evidence between the Viking Company and the Austin Company?

A. Yes.

Q. And you are familiar with this paragraph 7 that we have discussed?

A. Yes.

Q. I was going to ask you whether or not pursuant to the terms of that contract, your company did in fact take out public liability insurance."

2. **That the best evidence was the application for such coverage and the insurance policy or endorsement thereon if any such documents existed.**

Section 1855 of the California Code of Civil Procedure reads as follows:

"1855. *Secondary Evidence of contents of document.* There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.
2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
3. When the original is a record or other document in the custody of a public officer.
4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.

5. When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.

   In the cases mentioned in subdivisions three and four, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents."

No foundation was laid, nor was any testimony introduced which would bring into operation any of the exceptions hereinabove set forth in said Code section. Respondent was never requested to produce these documents.

None of the pre-trial discovery procedures were followed, nor was any reason given why none of these motions or procedures were not pressed by appellant after Judge Erskine had made his order dated July 24, 1950. Under Rule 26 (a) of the Rules of Civil Procedure, appellant could have taken the deposition of any of the officers or employees of the defendant, Viking Automatic Sprinkler Co., either for discovery or to use as evidence in the trial of the case. Under Rule 45 (b) of the Rules of Civil Procedure, any applications for insurance or any policies of insurance held by the Viking Co. could have been subpoenaed at the time of the taking of the deposition of any of the employees and any other documents in the possession of the Viking Co. that would aid in the interpretation and the intent of the parties insofar as the sub-

ject contract was concerned, could have been subpoenaed. Under Rule 34 of the Rules of Civil Procedure, appellant could have secured an Order of Court requiring the Viking Co. to produce any material documents so that the plaintiff could examine, copy or photograph the same. Said documents or copies thereof would then have been available to have been introduced into evidence at the time of the trial if they were material and there was an endorsement or any language in any of the documents which would assist the Court in determining the intent of the parties and interpreting the contract in question. All of these procedures were followed by respondent.

In the absence of such procedure and proper offer of proof, the Court was justified in sustaining the objections of the respondent and there is nothing in the record and nothing before the Court to indicate whether the questions asked by Mr. Healy would have developed any material evidence or any admissible evidence. Although all the discovery procedures have been liberalized to permit fishing for evidence, such procedure certainly is improper in the middle of a trial.

IV.

APPELLANT ASSERTS THAT THE EVIDENCE MUST BE VIEWED MOST FAVORABLY TO IT ON THIS APPEAL.

This assertion is true but the only evidence appellant relies upon to prove that Viking Company intended to indemnify the Austin Company against its

own negligence is the insurance provisions of the contract. The fact that Viking Company was required to carry certain types of insurance certainly could not lead to the conclusion that Viking Company intended to indemnify the Austin Co. against its own negligence. The fact that Austin Co. carried insurance and also required Viking Co. to do so clearly shows that it was the intent of both parties to take care of their own obligations and any liabilities they might incur as a result of accidents.

The insurance provisions of the contract can further be reasonably and logically explained by referring to good business practice of any large business concern or contractor. The Austin Co. had a multi-million dollar construction contract and tremendous obligations to carry in the huge construction project that it had undertaken. Of necessity, it sub-let much of the work and if its subcontractors were unable to perform their portion of the work the general contractor, the Austin Company, certainly would have sustained substantial losses. Therefore, it was to its interest that none of the subcontractors were prevented from completing their work due to having large judgments rendered against them, as they might be unable to pay the same and have been forced into bankruptcy. The Austin Company could not take out insurance in its own name that would protect it from judgments being rendered against subcontractors covering liability claims for damages. However, this was a cost-plus contract and by requiring the subcontractors to carry insurance and then paying the premiums as part of the cost, the Austin Company fully protected itself.

This interpretation is further substantiated by the fact that although most construction contracts require the posting of a performance bond or surety bond by the contractor or sub-contractor, there was no requirement that the Viking Company procure such a bond in the present contract. Respondent feels that this is a very significant and strong point in assisting in the interpretation of the contract and indicating that the insurance coverage required was a substitute for the performance bond. It is to be noted in the case of *Southern Pacific Co. v. Fellows,* 22 C.A. (2d) 87, 71 P. (2d) 75, which is the only case cited by appellant in which recovery had been made under a so-called Hold-Harmless Agreement between the owner and a contractor, that the contract not only included a Hold-Harmless Agreement and provisions of insurance, but also had a provision requiring the contractor to post a performance or surety bond.

Under the interpretation of the contract contended for by appellant, the Viking Company would have been obligated to defend any action brought by any stranger against the Austin Company for personal injuries or damages if the same arose out of the negligence of the Austin Company on any of the work that they or any of their sub-contractors were performing in connection with the master contract. This is the only possible conclusion that could be reached if the interpretation of appellant is accepted.

Furthermore, the very fact that this was a cost-plus contract indicates that there was no intention to reimburse the Austin Company for its own negligence as

such a result under the provisions of the contract would be ridiculous. If the Viking Company were forced to pay a judgment to one of its employees or to a stranger on the basis of the so-called Hold-Harmless Agreement, it could then bill the Austin Company for its expenditures plus 10% for overhead and 8% for profit.

CONCLUSION.

Appellant's only specification of error (Appellant's Brief 4) is that the Court did not permit the appellant to attempt to prove through Samuel A. Johnson that the Viking Company had a contract of public liability insurance with a contractual endorsement on it.

The ruling of the trial Court was proper in that:

1. No proper foundation was laid.
2. It was not the best evidence.
   a. No attempt was made to show why the best evidence was not offered.

Therefore, it is respectfully submitted that the judgment of the trial Court should be sustained.

Dated, San Francisco, California,
August 1, 1951.

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